IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1947

No. 234

PHILIP MILTON KORITZ, CAL ROBERSON JONES, and MARGARET DE GRAFFENREID,
Petitioners,

vs.

STATE OF NORTH CAROLINA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

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Respondent relies heavily in its brief on the recent decision of this Court in Fay v. New York, 167 Sup. Court Reporter 1613, decided June 23, 1947.

Petitioners submit however that the cited decision not only fails to lend weight to Respondent's contention but strengthens the basic premise of the petition for a writ of certiorari herein.

Respondent claims that the method employed in the selection of the petit jury presents no substantial federal question.

But in Fay v. New York, this Court reiterated (p. 1626, supra):

> "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and in nearly all cases it has been shown to have persisted over many years."

The Petitioners submit that the incontrovertible facts of the trial below present the most flagrant discriminatory abuses of the right of a class—the Negro people—to serve on the jury. These practices, the proof showed, persisted for a period of at least ten years.

Moreover, in Fay v. New York, this Court went beyond the doctrine of racial discrimination, which specific statutes prohibit, stating (p. 1628, supra):

> "But this Court has construed it to be inherent in the independent concept of due process that condemnation shall be rendered only after a trial, in which the hearing is a real one, not a sham or pretense * * * Trial must be held before a tribunal not biased by interest in the event * * * Undoubtedly a system of exclusion could be so manipulated as to call a jury before which defendants would have so little chance of a decision on the evidence that it would constitute a denial of due process."

In the Fay case, this Court merely found no evidence of discrimination against a class, as claimed.

If, in the Fay case, evidence had been adduced that for a period of ten years a well-defined class of workers had been systematically denied jury service, then it is inferra-

ble this Court would have regarded the resultant jury panel as defective.

It is true that this Court in the Fay case said, supra, (p. 1627):

> "This Court, however, has never entertained a defendant's objection to exclusions from the jury except when he was a member of the excluded class."

This Court added, however:

> "Nevertheless, we need not here decide whether lack of identity with an excluded group would alone defeat an otherwise well-established case under the Amendment."

The Petitioners urge that, as to the white Petitioner Koritz, his lack of identity with the excluded Negroes should not "defeat an otherwise well-established case under the Amendment." His fate was so inextricably linked with the excluded class, as set forth in detail in Petitioners' brief (p. 46 et seq.), as to effect a denial of an impartially constituted jury for his trial.

Nor do assertions that the questions raised by the petition were not expressly or necessarily decided by the Supreme Court of North Carolina merit serious consideration. Aside from the fact that the Supreme Court of North Carolina most assuredly did pass on the questions presented here, the Fay case passed on the constitutional problems involved even though there were no findings of fact and no opinion thereon by the Court below. This Court said (supra, p. 1620):

> "We would, in any case, be obliged on a constitutional question to reach our own conclusions, after full allowance of weight to findings of the state courts, and in this case must examine the evidence."

CONCLUSION.

Nothing contained in Respondent's brief should lead this Court from the conclusion, as it remarked in the Fay case, "No device, whether conventional or newly devised, can be set up by which the judicial process is reduced to a sham and courts are organized to convict."

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